SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 136.

THE UNITED STATES, APPELLANT,

vs.

ALBERT C. ENGARD.

APPEAL FROM THE COURT OF CLAIMS.

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1 Court of Claims.

ALBERT C. ENGARD
v.
THE UNITED STATES. } No. 23133.

I.—*Petition.*

To the honorable the Court of Claims:

The claimant, Albert C. Engard, respectfully represents:

1. He is a chief engineer in the United States Navy on the retired list. On February 11, 1897, and for some time prior thereto, he was a chief engineer in the United States Navy, on the active list, and on sea duty on the United States receiving ship "Richmond" at the navy-yard, League Island, Pennsylvania.

2. On the 11th day of February, 1897, he received the following order from the Acting Secretary of the Navy:

"Report by letter to the president of the steel inspection board, navy-yard, Washington, D. C., for temporary duty in connection with the inspection of steel tubes for the boilers of torpedo boat No. 11, at Findlay, Ohio, and at Shelby, Ohio.

"You are authorized to perform such travel between League Island, Pa., and Findlay, Ohio, and between League Island, Pa., and Shelby, Ohio, as may be necessary in the performance of this duty.

"Keep a memorandum of the travel so performed by you, certifying to its necessity, and submit the same to the Department, from time to time for its approval.

2 "This duty is in addition to your present duties."

3. In pursuance of said order he made the following journeys to inspect steel boiler tubes for said torpedo boat No. 11, traveling between League Island, Pennsylvania, and Shelby, Ohio:

1st journey: He left League Island, Pa., February 24th, when informed by the Shelby Tube Co. that the tubes were ready for inspection. After inspecting all of the tubes that were then ready, he returned to League Island, Pa., April 27th, 1897.

2nd journey: He left League Island, Pa., June 15th when informed by the chief of the Bureau of Steam Engineering that the remainder of the tubes were ready for inspection. He returned to League Island, Pa., August 14th, 1897, after the duty had been completed.

4. He submitted a statement of this travel to the Secretary of the Navy on the 23rd day of August, 1897, and asked the Department to approve such memorandum of travel in order that he might obtain mileage therefor. On the 24th day of August, 1897, his said memorandum was approved by the Navy Department. Thereafter, on August 27th, 1897, he submitted a claim to the Auditor for the Navy Department for mileage for travel performed on said two journeys, the distance travelled amounting to two thousand one hundred and sixty miles (2,160). On the 8th day of September, 1897, the Auditor advised him that said claim had been allowed in the sum of $39.10, but upon further

3 inquiry the claimant was advised by the Auditor as follows:

"In the recent settlement of your claim for mileage you were allowed $172.80, less the difference between other duty pay and sea pay for the time you were traveling and absent from the ship—from February

24th, 1897, to April 26th, 1897; from June 15th, 1897, to August 13th, 1897—or $133.70, leaving a balance due of $39.10."

5. The claimant appealed from said decision of the Auditor to the Comptroller of the Treasury, and said decision was on November 26, 1897, affirmed by the Comptroller.

6. By reason of the facts aforesaid, a claim has arisen to this claimant for the difference between the amount of mileage at eight cents a mile for 2,160 miles travelled, amounting to $172.80, as provided by the act of June 30, 1876 (1 Supp. R. S., 109), less the sum of $39.10 already paid.

No other action than as aforesaid has been had on this claim in Congress or by any of the Departments.

The claimant is the sole owner of this claim and the only person interested therein, and no assignment or transfer of this claim, or of any part thereof or interest therein, has been made.

4 The claimant is justly entitled to the amount herein claimed from the United States, after allowing all just credits and offsets. The claimant is a citizen of the United States, and has at all times borne true allegiance to the Government thereof, and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government, and the claimant believes the facts as stated in this petition to be true, and the claimant claims the sum of one hundred and thirty-three dollars and seventy cents ($133.70).

JOSEPH C. STEBBINS,
Attorney for Claimant.
GEORGE A. & WM. B. KING,
Of Counsel.

STATE OF PENNSYLVANIA,
County of Philadelphia:

Albert C. Engard, being duly sworn, deposes and says: I am the claimant in this case. I have read the above petition, and the matters therein stated are true, to the best of my knowledge and belief.

ALBERT C. ENGARD, U. S. N.

Subscribed and sworn to before me this 30th day of December, 1902.
[SEAL.]
W. ALEX. ROBINSON,
Notary Public.

Commission expires Jan. 13th, 1905.

5

II.—*Traverse.*

In the Court of Claims of the United States, December term, A. D. 1902.

ALBERT C. ENGARD
vs.
THE UNITED STATES. } No. 23133.

And now comes the Attorney-General, on behalf of the United States, and, answering the petition of the claimant herein, denies each and every allegation therein contained, and asks judgment that the petition be dismissed.

L. A. PRADT,
Assistant Attorney-General.

Filed April 30, 1903.

6 III.—*Findings of fact and conclusion of law, with the opinion of the court and the dissenting opinion. Filed May 25, 1903.*

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

FINDINGS OF FACT.

I.

On the 11th day of February, 1897, the claimant was a chief engineer in the United States Navy on the active list, performing duty on the U. S. R. S. "Richmond," at League Island, Pa. On February 11, 1897, the following order was issued to him:

"49154–G NAVY DEPARTMENT,
Washington, February 11, 1897.

"SIR: Report, by letter, to the president of the Steel Inspection Board, navy-yard, Washington, D. C., for temporary duty in connection with the inspection of steel tubes for the boilers of torpedo boat No. 11, at Findlay, Ohio, and at Shelby, Ohio.

"You are authorized to perform such travel between League Island, Pa., and Findlay, Ohio, and between League Island Pa., and Shelby, Ohio, as may be necessary in the performance of this duty.

"Keep a memorandum of the travel so performed by you, certifying to its necessity, and submit the same to the Department, from time to time, for its approval.

"This duty is in addition to your present duties.

"Very respectfully,

"W. MCADOO, *Acting Secretary.*

"Chief Engineer ALBERT C. ENGARD, U. S. Navy,
"*U. S. R. S. Richmond, Navy-Yard, League Island, Pa.*"

II.

In accordance with this order the claimant made two round trips between League Island, Pa., and Shelby, Ohio, to inspect steam boiler tubes for torpedo boat No. 11.

"First journey: I left League Island, Pa., February 24, when informed by the Shelby Tube Company that the tubes were ready
7 for inspection. After inspecting all of the tubes that were ready, I returned to League Island, Pa., April 27, 1897.

"Second journey: I left League Island, Pa., June 15, 1897, when informed by the chief of the Bureau of Steam Engineering that the remainder of the tubes were ready for inspection. I returned to League Island, Pa., August 14, 1897, after the duty had been completed."

The total number of days of absence from claimant's vessel—one hundred and twenty-two.

III.

The claimant made application for mileage upon this trip amounting to $172.80 and was allowed this amount as mileage by the Auditor for

the Navy Department. From this sum there was deducted the difference between sea pay and shore pay at the rate of $400 a year for one hundred and twenty-two days absent from his vessel, alleged to be on shore duty, amounting to $133.70, and the balance as mileage ($39.10) was paid him.

IV.

The claimant has never recovered the balance of mileage claimed.

CONCLUSION OF LAW.

Upon the foregoing findings of fact the court decides, as a conclusion of law, that the claimant recover judgment in the sum of one hundred and thirty-three dollars and seventy cents ($133.70).

NOTT, Ch. J., delivered the opinion of the court:

The statute relating to sea pay (Rev. Stat., 1571) is sweeping in its terms, but in neither departmental nor judicial construction has it been taken literally.

A ship at anchor is not a ship at sea; a ship sailing up a river is not a ship at sea; a ship in service on inland waters is not a ship at sea; a ship hauled up on a dry dock in a foreign port is not a ship at sea; a ship fighting her way up the Mississippi in 1862 was not a ship at sea; yet in all of these cases it has been held by the accounting officers or the courts that officers serving on such vessels were entitled to sea pay—that a ship at sea means nothing more than a ship afloat, she being at the same time so commissioned, authorized, and organized as to be able to render some kind or other of marine service.

As with the vessels, so with the officers, the statute has never been applied literally. The plain purpose of Congress is that the Government shall pay more where the officer renders more. Service on shipboard involves the breaking up of arrangements for living on shore; separation from family and friends; increased expenses and expenditures; increased hardships and duties; and many personal restrictions. The invariable questions which have been asked in doubtful cases have been, "Was the officer deprived of the ease and comfort and economies of shore duty?" "Did the service to which he was assigned require the sacrifice and discomforts and expenses of a life at sea?" If it did, he was entitled, within the legislative intent, to be considered on duty in a ship at sea; if it did not, he was entitled to no more than the pay of an officer on shore duty.

8 It is also as well settled as the Navy Regulations and the action of the accounting officers and the decisions of the court can make it that the sea pay of an officer does not stop every time he sets his foot upon the shore (Collins's case, 37 C. Cls. R., 222). There is a difference between "shore duty" and duty on shore. It would be a monstrous perversion of the legislative purpose to say that the officers of a naval force landed to assault an enemy's land batteries, or to protect a town, or to guard a consulate, or to bring off wood or water or provisions are in return for extra and hazardous service to be cut down in their pay.

The regulations of a department can not make the law or change it, but the head of a department, by general regulations, can interpret the law for the benefit of his subordinates and give to it practical application. Accordingly, the Navy Regulations provide for the benefit of naval paymasters.

"An officer temporarily absent from a ship in commission, to which he is attached, shall continue to receive sea pay."

This states clearly a general principle. The difficulty in such case probably will be to determine what is temporary absence and what is an assignment to shore duty.

In the present case the Secretary of the Navy has relieved the court from the duty of determining that question by the express terms of his order, which characterizes this officer's added duty of inspecting steel tubes for boilers and his consequent absence from shipboard, as "temporary," and expressly refuses to relieve him from the duties and consequent responsibilities of his sea service. It is manifest that the chief engineer of a great ship of war like the "Richmond" has many duties and responsibilities besides appearing on the deck in uniform—such as making reports, ordering supplies, carrying on correspondence, preparing against accidents to his machinery, supervising the work and discipline and accounts of his subordinates. The "Richmond" continued to lie at the League Island Navy-Yard while the chief engineer went to Shelby, Ohio, to inspect boiler tubes; but he, and no other officer, continued to be her chief engineer as completely as if he walked her deck and slept in her cabin. His service in inspecting boiler tubes was, per se, shore duty; but his service on the "Richmond" at the same time was sea service, and the one was "temporary" and the other permanent.

In Symonds's case (21 C. Cls. R., 148) it was held that the Secretary of the Navy could not deprive an officer of his lawful pay by designating as shore duty that which was in fact sea service. Still less does it seem possible that a Secretary can attach an officer to a vessel at sea and compel him to discharge the duties of an important position, and burden him with its responsibilities, and then deprive him of his lawful pay by compelling him to perform additional duties on land. No person would say that this officer was not entitled to sea pay because he was doing work on land and that he was not entitled to shore-duty pay because he was attached to and doing duty upon a vessel at sea. Yet that would be the logical result of reasoning based upon a literal reading of the statute.

It is true that in this case the officer's absence while inspecting boiler tubes can be accurately ascertained, and in that particular the case differs from those of McGowan (36 C. Cls. R., 63) and Taussig (38 I., —); but the court can not assume, in the face of the Secretary's order, that the officer was doing nothing else and had nothing else to do.

9 It must be held that when the Secretary of the Navy characterizes a special service which he requires a naval officer to perform and the officer's consequent absence as "temporary," the officer is entitled to the benefit of the characterization; and that when an officer duly attached to a ship at sea and entitled to sea pay has additional shore duty placed upon him by an order of the Secretary of the Navy, which in

express terms declares that the shore duty is "in addition" to the officer's duties on his ship, the officer is not thereby deprived of his sea pay. A different conclusion would not only work the injustice of lessening the pay by increasing the duties, but would hamper and embarrass the Secretary of the Navy in the administration of his office.

The judgment of the court is that the claimant recover $133.70.

WRIGHT, J., dissenting:

I do not concur in the conclusion of the majority of the court, nor in the reasoning contained in the opinion. The language of section 1571, Revised Statutes, is plain and positive, that "No service shall be regarded as sea service except such as shall be performed at sea, under the orders of a Department, or in vessels employed by authority of law." The services for which the claimant seeks a recovery in this case were not performed at sea, nor in any vessel, but were performed at places far inland.

It is immaterial that the order giving shore duty designated the same as temporary and in addition to sea duty, for such services were inconsistent; the one could not be performed while in discharge of the other. Besides, the officer assigning to shore duty was not empowered to supersede the authority of the statute, and if by his order he assumed to do so, his act was a nullity and without force or effect. If the reasoning of the opinion of the majority of the court can be given effect to avoid the sanction of the statute in the present case, it is not an impossibility to evade its provisions in every case where it may be desirable to put an officer on shore duty with sea pay; and thus the will of Congress may be wholly frustrated, and the authority of its enactments frittered away.

10 IV.—*Judgment of the court.*

ALBERT C. ENGARD
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UNITED STATES. } No. 23133.

At a Court of Claims held in the city of Washington on the 25th day of May, A. D. 1903, judgment was ordered to be entered as follows:

The court, on due consideration of the premises, find for the claimant, and do order, adjudge, and decree that the claimant, Albert C. Engard, do have and recover of and from the United States the sum of one hundred and thirty-three dollars and seventy cents ($133\frac{70}{100}$).

BY THE COURT.

11 V.—*Application for and allowance of appeal.*

ALBERT C. ENGARD
v.
UNITED STATES. } No. 23133.

From the judgment rendered in the above-entitled cause on the 25th day of May, 1903, in favor of the claimant, the defendants, by their

Attorney-General, on the 4th day of August, 1903, make application for and give notice of an appeal to the Supreme Court of the United States.

L. A. PRADT,
Assistant Attorney-General.

Filed August 4, 1903.

OCTOBER 26, 1903.

Allowed as prayed for.

BY THE COURT.

12 ALBERT C. ENGARD *vs.* THE UNITED STATES. } No. 23133.

I, John Randolph, assistant clerk of the Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact, and conclusion of law, of the opinion of the court and the dissenting opinion, of the judgment of the court, of the application for and allowance of appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Claims this 28th day of October, A. D. 1903.

[SEAL.]

JOHN RANDOLPH,
Assistant Clerk Court of Claims.

(Indorsement on cover:) File No. 19102, Court of Claims. Term No. 136. The United States, appellant, vs. Albert C. Engard. Filed October 31st, 1903. File No. 19102.

O

In the Supreme Court of the United States.

OCTOBER TERM, 1904.

THE UNITED STATES, APPELLANT,
v.
ALBERT C. ENGARD. } No. 136.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

On the 11th day of February, 1897, the claimant, Albert C. Engard, was a chief engineer in the United States Navy, performing duty on a United States receiving ship at League Island, Pa., receiving sea pay therefor. On said date an order was issued by the Secretary of the Navy directing claimant to report by letter to the Steel Inspection Board, Washington, D. C., for temporary duty in connection with the inspection of certain steel tubes at Findlay and at Shelby, Ohio. The order contained the following: "This duty is in addition to your present duties." (See record, p. 3.) In accordance with the order the claimant made two

round trips between League Island, Pa., and Shelby, Ohio. On the first trip he left League Island February 24 and returned April 27. On the second trip he left League Island June 15 and returned August 14, the total time engaged in said duty of inspection being one hundred and twenty-two days. (Record, p. 3.)

The claimant made application for mileage amounting to $172.80, which claim was allowed by the accounting officers, but they contended that for the one hundred and twenty-two days consumed by the claimant in inspecting steel, he was entitled to "shore duty pay" only, and deducted from the claim for mileage the difference between "shore duty pay" and "sea pay" for said time, the sum of $133.70, paying to claimant $39.10. He brought this action to recover the remainder, $133.70. (Record, pp. 3 and 4.)

The case was heard by the Court of Claims, and upon the findings of fact set forth in the record (pp. 3 and 4) the court found, as a conclusion of law, that "Upon the foregoing findings of fact the court decides, as a conclusion of law, that the claimant recover judgment in the sum of one hundred and thirty-three dollars and seventy cents ($133.70)." The court thereupon ordered judgment to be entered in said amount.

From the judgment so entered the United States takes this appeal.

ASSIGNMENT OF ERRORS.

1. The court erred in its conclusion of law.

2. The court erred in rendering judgment for claimant.

ARGUMENT.

Section 1571, Revised Statutes, provides as follows:

> No service shall be regarded as sea service except such as shall be performed at sea under the orders of a Department, or in vessels employed by authority of law.

In seeking to interpret this statute there have been a number of cases before the courts for the purpose of determining when a naval officer should receive "shore-duty pay" and when "sea pay," where his duties are of a mixed character, partly shore and partly sea duty, and many complicated and intricate questions have thus arisen, dependent upon the facts and circumstances surrounding each individual case. As a result of this litigation at least two general principles have been formulated: First, that the pay of a naval officer is not determined by the nature of the order assigning him to duty, but, on the other hand, is determined by the nature of the duties actually performed by the officer. Second, that where the services performed are partly sea duty and partly shore duty, the *paramount* duty should determine the pay where it is possible to segregate the time spent in sea service from the time spent on shore duty. As a corollary, it may be said that an order from the Secretary of the Navy may have the effect of relieving an officer from either shore duty or sea duty, notwithstanding the fact that the order does not do so *eo nomine*.

PAY NOT DETERMINED BY THE ORDER.

In the case of *Symonds* v. *The United States* (21 C Cls. R., p. 148) the Secretary of the Navy decided that the officers of the *New Hampshire* would be considered as attached to a vessel commissioned for sea service, and on July 7, 1882, an order was issued by the Secretary of the Navy that "on and after the 1st of August next the *New Hampshire* will *not* be considered in commission for sea service." Symonds brought his suit in the Court of Claims for sea pay, and the court held that he was entitled to such pay, in the following language:

> The legal essence of things can not be changed by a mere name—by the volition of an executive officer in charge of executive duty.

The court further held that when the officer was ordered by the Department on board the ship *New Hampshire* to perform duties, he became "at sea," and was in the performance of duties at sea within the meaning of section 1571; that his right of sea pay attached under section 1556, Revised Statutes; and that it was beyond the power of the Secretary to change this as long as the elements of sea service continued as marked by the character of the duties. The case was appealed by the United States to this court, and the judgment of the court below affirmed. (120 U. S., 46.) In the opinion Mr. Justice Harlan propounds the following inquiry:

> Does the statute confer upon the Secretary of the Navy, acting alone or by direction of the

> President, the power to declare a particular service to be shore service if in fact it was performed by the officer when "at sea" under the orders of the Department and on a vessel employed with authority of law?

and answers the inquiry as follows:

> But Congress certainly did not intend to confer authority upon the Secretary of the Navy to diminish an officer's compensation as established by law by declaring that to be shore service which was in fact sea service, or to increase his compensation by declaring that to be sea service which was in fact shore service. The authority of the Secretary to issue orders, regulations, and instructions, with the approval of the President, in reference to matters connected with the naval establishment, is subject to the condition necessarily implied that they must be consistent with the statutes which have been enacted by Congress in reference to the Navy. (Case cited, p. 49.)

The foregoing doctrine was reaffirmed by this court in *United States* v. *Bishop* (120 U. S., 51), *United States* v. *Strong* (125 U. S., 656), and *United States* v. *Barnette* (165 U. S., 174), and followed by the Court of Claims in *McRitchie* v. *United States* (23 C. Cls. R., 23), and *Aulick's case* (27 C. Cls. R., 109).

In the case of Barnette, Mr. Justice Gray, speaking for the court, says (p. 179):

> The fact that this service was called, in the order of the Secretary of the Navy assigning him to duty upon this vessel, "employment on

> shore duty," is immaterial. The material question is whether the service was in fact performed at sea and not on shore, and not upon the name by which the Secretary of the Navy was pleased to designate it.

Also see *Pierce* v. *United States* (33 C. Cls. R., 294); *Wyckoff* v. *United States* (34 C. Cls. R., 288).

In the last-mentioned case the court used the following language:

> The right to pay for a sea service attached when that kind of service began, and this right continued as long as the service continued, independent of the order of the Secretary of the Navy by which the service on board the ship was declared to be merely additional to that on shore. * * *
>
> The rules of the service imposed upon the plaintiff duties incident to a ship at sea, and the substantial essence of the transaction, and not the mere name of it, must govern the amount of the pay. (See pp. 293 and 294 of case cited.)

In the *McGowan case* (36 C. Cls. R., p. 69) the court said:

> It has been held by this court, and in substance affirmed by the Supreme Court, that the Secretary of the Navy can not arbitrarily change and classify by an order the character of the duty to be performed, whether shore or sea duty.
>
> In the case of *Symonds* v. *United States* (21 C. Cls. R., 148) it is in substance said that the Secretary of the Navy can not change the char-

> acter of an officer's service from sea service to shore service by simply ordering that it be so regarded. The Supreme Court affirmed that view of the law both as to the Strong and Symonds case. * * * We cite these cases for the purpose of showing that the mere designation of the Secretary as shore duty will not have the legal effect of changing the quality of the service.

See also *Hannum* v. *United States* (36 C. Cls. R., 99). In the case of *Taussig* v. *United States* (38 C. Cls. R., 112) the court said:

> That is to say, from the law as embodied in section 1571, as construed by the Supreme Court and this court in the cases cited to which we have referred, and not from the regulation, the court must determine whether the service is or is not sea service. The Secretary of the Navy has not the power to declare sea service to be shore service, nor has he the power to declare shore service to be sea service.

PARAMOUNT DUTY SHOULD DETERMINE PAY.

On the second proposition, namely, that where the services performed are partly sea duty and partly shore duty, the *paramount* duty should determine the pay when it is possible to segregate the time spent in sea service from the time spent on shore duty, we cite:

In the *McGowan case, supra* (p. 68), the court found that—

> It is not practicable to segregate the time spent in actual duty on shipboard from that spent in the performance of whatever duties

were required of him on shore, as he was called on day and night to supervise matters on board ship, in the barracks, and on the island.

Again (p. 69) the court said:

> The disallowance of the claim by the Department was upon the theory that the paramount duty of the claimant was on land and not on the sea or ship. The claimant did perform some service at sea in a ship under orders of the Department and in a vessel employed by authority of law; but if the service which he performed on land in the barracks and the service on the ship is to be regarded as a unit of service, can it be said that he was in the discharge of sea duty in derogation of the order of the Secretary designating it as shore duty?

On page 70 the court said:

> The order of the Secretary assigning him to duty in the command of the ship and the training station and the evidence clearly show that the training station had incident to it the paramount performance of the duty as the result of the conditions existing at the place to which he was assigned.

In the case of *Wyckoff* v. *United States* (34 C. Cls. R., 293) the court gave a judgment for the claimant where the facts showed a mixture of shore and sea service, upon the ground that the shore service was the incident and not the paramount duty. When the duty partakes of the character of sea service and shore duty, the fact of each particular case must be considered; and if from the whole case there is a preponderance

> in favor of either service, the service having the paramount character must constitute the basis on which to predicate the right of payment.

In the McGowan case the court dismissed claimant's petition.

In the case of *Taussig* v. *United States* (38 C. Cls. R., p. 104) the court said:

> The claimant's duties as hydrographic inspector were, as set forth in said finding, of far more importance than his duties as commanding officer of the vessel.

And by reason of the fact that the court found his shore duty paramount to his sea service, the court dismissed his petition.

While it is true that the claimant here was attached to the U. S. S. *Richmond*, and that the order provided that his inspection of steel was in addition to his duties, yet we contend that this order for the inspection of steel clearly had the effect for the time being of detaching him from duty on the *Richmond*, as from the very nature of his duties as inspector of steel it was impossible for him to perform any service whatever upon the ship.

In the opinion of the court we find the following language:

> It is manifest that the chief engineer of a great ship of war like the *Richmond* has many duties and responsibilities besides appearing on the deck in uniform—such as making reports, ordering supplies, carrying on correspondence, preparing against accidents to his machinery,

> supervising the work and discipline and accounts of his subordinates. The *Richmond* continued to lie at the League Island Navy Yard while the chief engineer went to Shelby, Ohio, to inspect boiler tubes; but he, and no other officer, continued to be her chief engineer as completely as if he walked her deck and slept in her cabin. His service in inspecting boiler tubes was, *per se*, shore duty; but his service on the *Richmond* at the same time was sea service, and the one was "temporary" and the other permanent. (Rec., p. 5.)

We find nothing in the record indicating that claimant had duties to perform on the *Richmond* during the time he was performing inspection duty, nor any responsibilities in relation thereto. Neither do we find anything which justifies the statement that the claimant, "and no other officer, continued to be her chief engineer as completely as if he walked her deck and slept in her cabin." This may or may not be true, but there is nothing in the record to show whether it is or not, and if it were a fact, it in no wise weakens the principle for which we contend in this case. The findings show a clear, distinct period of time of one hundred and twenty-two days during which claimant could not possibly have performed sea service, and this period is segregated and set apart from any possible sea duty, and we therefore contend that the case falls within the decisions that the paramount duty must determine the pay.

The *Richmond* is not "a great ship of war," as denominated by the Chief Justice in his opinion, but

on the other hand, it will be seen by consulting any register of the Navy that the *Richmond* is classed as a receiving ship with but 2,700 tons displacement. In the Naval Register of January 1, 1904, the *Richmond* is not given among either the first, second, third, or fourth rate vessels, neither does she rise to the dignity of a tugboat or sailing ship, but is placed in the class of receiving ships, which is the very lowest rate vessel in commission.

It is probable that the duties devolving upon an engineer on such a vessel as the *Richmond*, tied up at the harbor and doing duty as a receiving ship, could be performed by some inferior officer as an assistant engineer, especially in view of the fact that all great vessels have assistant engineers that perform the duties of the chief engineer, in the absence of that officer even when the vessel is in active service.

The record does show, inferentially, that this receiving ship remained at League Island, Pa., during the absence of claimant, and from the general nature of the duties of a receiving ship it must be inferred that the machinery was not required to be in condition to keep up steam any time during this period. The total length of time the *Richmond* was at League Island, Pa., is not shown in the record, but certainly the duties of the engineer on the vessel would be of the most elementary nature and could be performed by any subordinate. As a matter of fact, those duties, whatever they were, were performed by some one other than this claimant for the reason that he was not there.

If the claimant made any reports, ordered any supplies, carried on any correspondence, made any preparation against accidents to his machinery, or supervised the work and discipline of his subordinates during the one hundred and twenty-two days when he was in Ohio inspecting steel, there is nothing in the record to show the same and we do not know from what source the court below derived the information that would lead to any such inference.

Assuming, for the sake of this argument, that claimant was not relieved from his duty on the ship, yet it can not be denied that for this period of one hundred and twenty-two days his shore duty was clearly *paramount* to his sea duty. During the claimant's absence from the ship he was in the actual performance of duties entirely incompatible with sea service—duties that have always been recognized as shore service—and the effect of the order was to temporarily detach him from sea service and place him on shore duty. No *ipse dixit* of the Secretary of the Navy could make the service performed during these one hundred and twenty-two days' sea service, and no kind of declaration can change the shore service performed by claimant into sea duty. The mere fact that the order did not contain express words temporarily detaching him from sea service during the time that he was performing the shore service does not change the character and nature of the shore service into sea service. In the dissenting opinion, Judge Wright said:

> The services for which the claimant seeks a recovery in this case were not performed at sea,

nor in any vessel, but were performed at places far inland.

It is immaterial that the order giving shore duty designated the same as temporary and in addition to sea duty, for such services were inconsistent; the one could not be performed while in discharge of the other. Besides, the officer assigning to shore duty was not empowered to supersede the authority of the statute, and if by his order he assumed to do so, his act was a nullity and without force or effect. If the reasoning of the opinion of the majority of the court can be given effect to avoid the sanction of the statute in the present case, it is not an impossibility to evade its provisions in every case where it may be desirable to put an officer on shore duty with sea pay; and thus the will of Congress may be wholly frustrated and the authority of its enactments frittered away. (Rec., p. 6.)

In the case of *Schoonmaker* v. *United States* (19 C. Cls. R., 170) the claimant was a commander in the United States Navy and was ordered by the Secretary of the Navy to report to the Secretary of the Treasury for duty as light-house inspector. He was on duty as light-house inspector from January 1, 1875, until November 15, 1878, a period of nearly four years. Between July, 1877, and July, 1878, he was aboard a steamer provided by the Government exclusively for light-house service, and while on board of this steamer was engaged in the work of inspecting light-houses, beacons, etc. The period for which he was on board was one hundred and eight days, but the court held

that to be entitled to sea pay he must be afloat and under orders to perform sea service, and did not consider such duty as sea service.

In the case of Wyckoff, *supra*, the claimant was in command of a naval station, under an order which designated it as shore duty, and doing shore duty and receiving shore pay. While in the performance of such shore duty and in receiving shore pay, he received the following order: "In addition to your present duties, you will assume command of the U. S. S. *Nipsic*." The officer continued to perform both duties, but was allowed by the accounting officers shore pay only. He brought suit for full sea pay during the time he was performing both duties. The court gave judgment for the amount of claimant's demand, and held:

> The right to pay for a sea service attached when that kind of service began, and this right continued as long as the service continued, independent of the order of the Secretary of the Navy by which the service on board the ship was declared to be merely additional to that on shore.

In the case at bar the situation is exactly reversed. Here the officer was drawing sea pay while doing service on the *Richmond* under an order which entitled him to sea pay. He received orders commanding him to do additional duties, exactly as in the case of Wyckoff, but those additional duties, instead of being sea service, were shore service, and, just as the original order in the Wyckoff case, did not operate to prevent the change from "shore pay" to "sea pay" when he

performed actual sea service, so in this case the order assigning the claimant to additional duties could not continue him on sea pay for the one hundred and twenty-two days spent in inspecting steel, which is clearly shore service, no matter how the order was worded.

It is respectfully insisted that the decision of the Court of Claims in this case was erroneous and should be reversed.

LOUIS A. PRADT,
Assistant Attorney-General.

JOHN Q. THOMPSON,
Special Attorney.

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IN THE

Supreme Court of the United States.

October Term, 1904.

THE UNITED STATES, *Appellant*,
v.
ALBERT C. ENGARD. } No. 136.

BRIEF FOR APPELLEE.

Statement of Case.

The appellee claimed in the Court of Claims the difference between sea and shore pay as Chief Engineer in the navy. The facts, stated in the findings of fact (rec. pp. 3, 4), may be summarized as follows:

On February 11, 1897, the claimant was performing duty on the United States Receiving Ship *Richmond* at League Island, Pa. That was sea duty under the decisions of this court in *United States* v. *Symonds* (120 U. S. 46), and *United States* v. *Strong* (125 U. S. 656). He was on that date ordered to perform "temporary duty" in the inspection of boiler tubes at Findlay and Shelby, Ohio, and authorized to travel as necessary between League Island and these points. The order closes with these words: "This duty is in addition to your present duties." He was not detached from the *Richmond*. He made two inspection trips, from February 24 to April 27, and from June 15 to August 14, 1897.

The Treasury Department allowed him only shore pay

during these two periods of temporary absence from his vessel.

The Court of Claims decided that he is entitled to sea pay and gave judgment accordingly, 38 C. Cls. 712.

Statutes.

The statutes relating to this subject are the following:

Revised Statutes, § 1556:

"The commissioned officers and warrant officers on the active list of the Navy of the United States, and the petty officers, seamen, ordinary seamen, firemen, coal-heavers, and employes in the Navy, shall be entitled to receive annual pay at the rates herein stated after their respective designations: * * *

"Chief engineers * * * during the second five years after date of commission, when at sea, three thousand two hundred dollars; on shore duty, two thousand eight hundred dollars; * * *."

Revised Statutes, § 1571:

"No service shall be regarded as sea service except such as shall be performed at sea, under the orders of a Department and in vessels employed by authority of law."

Regulations.

The Naval Regulations of 1896, bearing on this subject, are the following:

Paragraph 1154:

"(1) Officers shall be entitled to sea pay while attached to and serving on board of any ship in commission under the control of the Navy Department, the Coast Survey, or the Fish Commission. * * *

"(3) An officer temporarily absent from a ship in commission to which he is attached, shall continue to receive sea pay."

Paragraph 1168:

"A temporary leave of absence does not detatch an officer from duty nor affect his rate of pay."

The Issue of Law.

The only question in this case is whether a naval officer on sea duty is entitled to sea or shore pay when, in addition to his sea duties, he is ordered to temporary duty on shore. By the Naval Regulations (Par. 1154 quoted), an officer thus temporarily absent from his ship continues to draw sea pay. The Court of Claims says of this (rec. 5):

"The regulations of a department can not make the law or change it, but the head of a department, by general regulations, can interpret the law for the benefit of his subordinates and give to it practical application."

It rests upon the United States to show that this regulation is contrary to law.

It is not within the intent of the law to take away from an officer the right to sea pay merely for a brief period, when he is given additional duty requiring him temporarily on shore. The argument is fully stated in the opinion of the court (rec. 4.):

"The plain purpose of Congress is that the Government shall pay more where the officer renders more. Service on shipboard involves the breaking up of arrangements for living on shore; separation from family and friends; increased expenses and expenditures; increased hardships and duties; and many personal restrictions. The invariable questions which have been asked in doubtful cases have been, 'Was the officer deprived of the ease and comfort and economies of shore duty?' 'Did the service to which he was assigned require the sacrifice and discomforts and expenses of a life at sea?' If it did, he was entitled, within the legislative intent, to be considered on duty in a ship at sea; if it did not, he was entitled to no more than the pay of an officer on shore duty.

"It is also well settled as the Navy Regulations and the action of the accounting officers and the decisions of the court can make it that the sea pay of an officer does not

stop every time he sets his foot upon the shore (Collins's case, 37 C. Cls. R. 222). There is a difference between 'shore duty' and duty on shore. It would be a monstrous perversion of the legislative purpose to say that the officers of a naval force landed to assault an enemy's land batteries, or to protect a town, or to guard a consulate, or to bring off wood or water or provisions are in return for extra and hazardous service to be cut down in their pay."

An officer sent temporarily to hospital without detachment from his vessel, is held even by the Treasury Department entitled to sea pay. The Comptroller decided (2 Comp. Dec. 299):

"It would be absurd to hold that every time an officer was compelled by ill health to go into hospital for temporary treatment he is thereby detached from the service to which he had been ordered by the Secretary. It rests with the Secretary to so detach him and place him upon 'leave or waiting orders.' * * *

"Illness is an incident to any kind of service, and while the rate of pay provided in section 1556, Revised Statutes, is dependent upon the character of the service performed irrespective of naval regulations or orders in contravention thereto (*United States* v. *Symonds, supra*), yet in my opinion illness alone can not alter the character of the service, and consequently the pay attached thereto under the provisions of this section."

That decision in its application to temporary absence on account of illness has been followed by the Court of Claims in *Collins* v. *United States* (37 C. Cls. 222), where the court says (p. 225):

"The claimant was attached to a vessel employed by authority of law, and while serving at sea, in the line of duty, received a gunshot wound which necessitated his removal to the hospital; and while he was ordered to the hospital he was not detached from his vessel, so that he was temporarily absent, not on his own motion, but by reason of the misfortune incurred in the line of duty.

"This class of cases was sought to be met by paragraph 1154 of the navy regulations (1896) wherein, among other things, it is provided:

"'An officer temporarily absent from a ship in commission to which he is attached shall continue to receive sea pay.'

"We do not believe the regulation contravenes the statute, as construed in the *Symonds* case, so long as the officer is attached to a vessel—in commission—to which he owes service.

"The status of the ship must determine the right of the officer attached thereto. That is to say, if a ship to which an officer is attached is in commission—performing sea service—his temporary absence therefrom, by authority, as in this case, will not deprive him of his right to sea pay."

This admission by the Comptroller of the Treasury, the executive officer charged with the primary decision of the liability of the United States, is entitled to great weight, both as showing the settled executive practice and as an admission by an officer whose duty in the determination of the liabilities of the United States must always require him in cases of substantial doubt to decide with the Government. If an officer temporarily absent from his vessel in hospital is entitled to sea pay during his absence, so much the more is sea pay due to an officer whose responsibilities as an officer of a vessel continue while he has, in addition to these, other duties ashore.

For the reasons given in the opinion of the Court of Claims the judgment should be affirmed.

JOSEPH C. STEBBINS,
Attorney for Appellee.

GEORGE A. KING,
WILLIAM B. KING,
Of Counsel.

Supreme Court of the United States.

No. 136.—October Term, 1904.

The United States, Appellant, *vs.* Albert C. Engard. } Appeal from the Court of Claims.

[February 20, 1905.]

Somewhat condensing the facts below found, they are as follows: In February, 1897, Chief Engineer Albert C. Engard was performing duty as the chief engineer of the United States receiving ship Richmond, at League Island, Pennsylvania. On the 11th of February he received the following order from the Navy Department:

"Navy Department,
"Washington, February 11, 1897.

"Sir: Report by letter, to the president of the Steel Inspection Board, navy yard, Washington, D. C., for temporary duty in connection with the inspection of steel tubes for the boilers of torpedo boat No. 11, at Findlay, Ohio, and at Shelby, Ohio.

"You are authorized to perform such travel between League Island, Pa., and Findlay, Ohio, and between League Island, Pa., and Shelby, Ohio, as may be necessary in the performance of this duty.

"Keep a memorandum of the travel so performed by you, certifying to its necessity, and submit the same to the Department, from time to time, for its approval.

"This duty is in addition to your present duties.

"Very respectfully,
"W. McAdoo, *Acting Secretary.*

"Chief Engineer Albert C. Engard, U. S. Navy,
"U. S. R. S. Richmond, Navy Yard, League Island, Pa."

Complying with this order, Chief Engineer Engard made two round trips between League Island and Ohio, in order to discharge the additional duty referred to in the order. The total number of days in which he was engaged in this work between February 24, 1897, and August 14, 1897, was 122. On an application to be allowed mileage for the trips, amounting to $172.80, the Auditor of the Navy Department deducted from the claim $133.70, and allowed only $39.10. The sum disallowed was deducted on the theory that the chief engineer was only entitled to be paid for shore duty instead of for sea service during the time referred to. This

suit was brought to recover the amount of the deduction, and the right to so recover was sustained by the Court of Claims. (38 Ct. Clms. R. 712.)

Mr. Justice WHITE, after making the foregoing statement, delivered the opinion of the Court.

A higher rate of pay is allowed to a chief engineer as well as to other naval officers when performing sea duty than when engaged on shore duty. (Rev. Stat. 1556.) And Rev. Stat. 1571 provides as follows:

"No service shall be regarded as sea service except such as shall be performed at sea, under the orders of a department and in vessels employed by authority of law."

The Government did not dispute at bar, however, that where an officer assigned to sea duty within the purview of the foregoing provision is called upon, without a change in his sea assignment, to perform merely temporary service ashore, he is entitled to sea pay. And this is in accord with the naval regulations, wherein it is provided:

Paragraph 1154:

"(1.) Officers shall be entitled to sea pay while attached to and serving on board of any ship in commission under control of the Navy Department, the Coast Survey, or the Fish Commission. . . .

"(3.) Any officer temporarily absent from a ship in commission to which he is attached shall continue to receive sea pay. . . ."

Paragraph 1168:

"A temporary leave of absence does not detach an officer from duty nor affect his rate of pay."

It is settled that the Navy Department has no power to disregard the statute and to deprive an officer of sea pay by assigning him to a duty mistakenly qualified as shore duty, but which is in law sea duty. (*United States* v. *Symonds*, 120 U. S. 46; *United States* v. *Barnette*, 165 U. S. 174.) And of course the converse is also true that the Navy Department has no power to entitle an officer to receive sea pay by assigning him to duty which is essentially shore duty and mistakenly qualifying it as sea duty. But there is no conflict between these rulings, and the conceded principle that where an officer is assigned to a duty which is essentially a sea service that he does not lose his right to sea pay whenever he is called upon to perform a mere temporary service ashore. In the present case it cannot be denied that the officer was assigned to sea duty and that the order of the department, instead of detaching him therefrom, simply ordered him to discharge a temporary service ashore in addition to his sea service. The whole contention of the Government is that this temporary shore service was necessarily incompatible with the continued performance of the officer's duty on the ship to which he continued to be attached, and therefore that the

shore duty was paramount to the sea service, and necessarily by operation of law affected the detachment of the officer so as to permanently relieve him from the sea duty to which he continued to be regularly assigned.

There is no finding in the record, however, which justifies this argument, and as urged at bar it rests upon the mere assumption of the incompatibility between the sea duty to which the officer was regularly assigned and the temporary shore duty which he was called upon by the department to discharge. In effect, the proposition is that it must be assumed as a matter of law, in the absence of a finding to that effect, that the temporary shore duty was of such a permanent character as to render it impossible for the officer to continue to perform duty under his permanent sea assignment, and, therefore, as a matter of law caused such assignment to terminate. We think the converse is true, and that where the assignment of an officer to duty by the Navy Department expressly imposed upon him the continued discharge of his sea duties and qualified the shore duty as merely temporary and ancillary to the regular sea duty, that the presumption is that the shore duty was temporary and did not operate to interfere with or discharge the officer from the responsibilities of his sea duty to which he was regularly assigned.

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.